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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1433

THOMAS BELLISTON, *et al.*,

Petitioners,

vs.

TEXACO INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT TEXACO INC. IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	5
A. The Robinson-Patman Claim	6
B. The Horizontal Price-Fixing Claim	9
C. The Tie-In Claim	13
ARGUMENT:	
The Decision Below Was Correct And Presents No Important Federal Questions	14
A. The Robinson-Patman Act Was Correctly Applied	14
B. The Horizontal Price-Fixing Claim Was Correctly Found To be Unsupported by the Evidence	18
CONCLUSION	21

Cases Cited

PAGE

Abramson v. Colonial Oil Co., 390 F. 2d 873 (5th Cir. 1968), cert. denied, 393 U.S. 831 15

Baldwin Hills Bldg. Materials Co. v. Fibreboard Paper Prods. Corp., 283 F. Supp. 202 (C.D. Cal. 1968) 16, 17

Borden Co. v. FTC, 339 F. 2d 953 (7th Cir. 1964) ... 15

Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 ..... 20, 20n

Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F. 2d 265 (7th Cir. 1961), cert. denied, 368 U.S. 829 ..... 15, 16

Cliff Food Stores, Inc. v. Kroger, Inc., 417 F. 2d 203 (5th Cir. 1969) 15

Food Basket, Inc. v. Albertson's Inc., 383 F. 2d 785 (10th Cir. 1967) 15

Hiram Walker, Inc., v. A & S Tropical, Inc., 407 F. 2d 4, (5th Cir. 1969), cert. denied, 396 U.S. 901 15

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 21

Littlejohn v. Shell Oil Co., 456 F. 2d 225 (5th Cir. 1972) 16, 17

Moore v. Mead's Fine Bread Co., 348 U.S. 115 .... 15, 17

Myers v. Shell Oil Co., 96 F. Supp. 670 (S.D. Cal. 1951) 17

Neely v. Eby Construction Co., 386 U.S. 317 21

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 21

Standard Oil Co. v. FTC, 340 U.S. 231 ..... 16, 17

PAGE

United States v. Beatrice Foods Co., 1972 Tr. Cas. ¶ 73,853 at p. 91,588 (D. Utah, 1972) 19n

United States v. Container Corp., 393 U.S. 333 ..... 11, 18, 18n, 19, 19n, 20, 20n

United States v. Continental Oil Co., 1971 Tr. Cas. ¶ 73,404 at p. 89,648 (D.N. Mex., 1971) 19n

United States v. FMC Corp., 1970 Tr. Cas. ¶73,258 (E.D. Pa., 1970) 19n

United States v. FMC Corp., 306 F. Supp. 1106 (E. D. Pa. 1969) 19n

Walker Oil Co. v. Hudson Oil Co., 414 F. 2d 588 (5th Cir. 1969), cert. denied, 396 U.S. 1042 15

Willard Dairy Prods. Corp. v. Nat. Dairy Prods. Corp., 309 F. 2d 943 (6th Cir. 1962), cert. denied, 373 U.S. 934 15

Statutes Cited

28 U.S.C. § 1254 (1) 1

Robinson-Patman Act 15 U.S.C. § 13(a) 2, 3, 5, 6, 8, 9, 10, 11, 14, 15, 16, 17, 20

Sherman Act, 15 U.S.C. § 1 ..... 3, 5, 21

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Rule 23(4) 14

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Opinion Below

The Court of Appeals' opinion is reported at 455 F.2d 173 and is printed as Appendix A to the Petition (App. A, pp. i-xix).

Jurisdiction

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on February 4, 1972 and rehearing was denied on March 7, 1972.

Questions Presented

Five pages of the Petition are devoted to a listing of 15 Questions Presented for review (Pet. 3-7). The Questions incorrectly state the decision below, present as facts matter which is not the subject of any evidence of record or is contrary to the evidence, fail to disclose other dispositive and critical facts and, regrettably, otherwise distort and misrepresent the true issues. Unfortunately, point by point explanation and correction would so lengthen this brief and burden this Court as to be totally inappropriate. In addition, as petitioners implicitly acknowledged in the Court of Appeals where their brief enumerated some 22 issues for review (pp. 2-4), this Court could in no event grant the relief plaintiffs seek—reinstatement of the district court judgment—without dealing with many more than Petitioners' 15 Questions.[1]

On the other hand, the Court of Appeals found it unnecessary to reach most of these issues because it concluded that each of the three claims before it should be dismissed. The bases upon which that Court predicated this conclusion present the following Questions:

> 1. Whether the Court of Appeals erred in concluding that the explicit jurisdictional prerequisite of the Robinson-Patman Act that "either or any of the purchases involved in such discrimination are *in commerce*", 15 U.S.C. §13(a), is not satisfied where the alleged discrimination involves Texaco's sales in Utah to petitioners (Texaco retailers in Utah) and to the alleged favored customer (a

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[1] Thus, Texaco's Docketing Statement in the Court of Appeals (pp. 7-19) presented some 39 issues, none of which has been waived. Needless to say, it would be an unwarranted imposition upon this Court to describe all such issues in this brief. However, to avoid any possible claim of waiver, Texaco respectfully incorporates such Docketing Statement listing by reference.

Texaco distributor in Utah) of gasoline refined by another oil company in Utah and purchased from the refinery by Texaco in Utah?

2. Whether the Court of Appeals, in reviewing the record in this case, erred in concluding that the evidence was insufficient to permit a finding that Texaco entered into an unlawful agreement with other major oil companies to fix the wholesale price of gasoline in violation of the Sherman Act?

3. Whether the Court of Appeals, in reviewing the record in this case, erred in concluding that the evidence was insufficient to permit a finding that Texaco engaged in tie-in selling with respect to tires, batteries and accessories ("TBA") in violation of the Sherman Act?

Because petitioners failed to meet even the threshold "commerce" requirement of their Robinson-Patman claim, the Court of Appeals did not have to deal with Texaco's further position that they also failed to sustain their burden of proof on each and every one of the other essential elements of that claim and that their underlying assumption that it was unlawful to charge wholesalers less than retailers was invalid. Thus, the Court did not reach the inadequacy of proof of injury to competition; the absence of any comparison of the net prices (after allowances) actually paid by each plaintiff and the net prices contemporaneously charged the wholesaler, Flinco, and hence the absence of any showing of the amount of any specific price discrimination; the insufficiency of proof of injury to plaintiffs proximately caused by the claimed discrimination and the absence of competent proof of damages. It also did not have to deal with Texaco's position that its pricing was sheltered by the meeting competition defense.

Similarly, with respect to the alleged horizontal price-fixing and TBA tie-in claims, since the Court of Appeals found the evidence of violation insufficient, it did not have to pass upon the total absence of proof of injury and damages in both instances, which independently requires their dismissal.

The foregoing issues and others, including the blatant denial of a fair trial to Texaco [2]—all of which it was unnecessary for the Court of Appeals to rule upon—would, if petitioners' request is granted, become issues for briefing and original review in this Court. Petitioners specifically advise that they do not wish remand of any question to the Court of Appeals (Pet. 6n).

Finally, petitioners seek review of the award of $32,249.25 costs for the printing of the trial transcript in the appendix on appeal. Again, the form of the Question Presented (Pet. 7, Ques. 14) is typically less than candid, as the facts presented to the Court of Appeals in the February 25, 1972 affidavit of Robert F. McGinnis, Esq. and exhibits thereto make clear. One of the issues on appeal was the pervasive bias and prejudice of the trial judge, going to every evidentiary ruling by him and his attitude and conduct throughout the trial. Consequently, it appeared undesirable to try to select and print only portions of the trial transcript rather than the whole. Before resolving the matter, however, Texaco's counsel sought and obtained the consent of petitioners' counsel to the designation of the full trial transcript for printing. Thereafter, on April

[2] Not only did the district judge substitute his view of the facts for those of the jury by directing verdicts in petitioners' favor on many issues, but he identified himself with petitioners' cause throughout. Even the bare statistics are revealing: *No* objection to any exhibit offered by petitioners was sustained; *Every* objection to exhibits offered by Texaco was sustained; 19 of every 20 objections by Texaco were denied; 68 of petitioners' 70 objections were sustained.

12, 1971, Texaco served and filed its Designation of the Contents of the Appendix which expressly referred to this agreement of counsel, stating: "The consent of plaintiffs' counsel has been obtained to this designation." Appellant then proceeded to incur the printing expense on the basis of this stipulation. Some two months elapsed before Texaco received a letter from plaintiffs' counsel dated June 9, 1971 stating for the first time that the understanding referred to in the April 12th Designation was incorrect. The Court of Appeals, upon consideration of the affidavits, correspondence and related circumstances, allowed an appropriate sum as taxable costs with respect to this printing. That anyone would attempt to treat this as a subject warranting consideration by the Justices of this Court—and at the same time withhold from this Court any mention of the April 12th Designation and related facts—is extraordinary. It presents no question for Supreme Court review.

Indeed, no aspect of the decision of the Court of Appeals presents any important question of federal law or is the subject of conflict among the circuits.

Statement of the Case

The Petition seeks review of the Tenth Circuit's decision reversing a judgment entered by the District Court, Hon. Willis W. Ritter presiding, on a jury verdict in petitioners' favor, and directing entry of judgment in favor of respondent Texaco. Since the case involves three distinct claims—price discrimination in violation of the Robinson-Patman Act and horizontal price-fixing and tie-in selling in violation of the Sherman Act [2]—the facts and proceedings relevant to each are set forth separately.

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[2] There was a fourth claim in the district court that Texaco allegedly fixed plaintiffs' retail prices of gasoline. The jury found

A. The Robinson-Patman Claim

Petitioners were fifteen Texaco retailers each of whom operated a Texaco gasoline service station in Salt Lake City, Utah, or its environs during all or part of the period June 1963 to June 1967, purchasing the product from Texaco and reselling it at retail to motorists.[4] Their principal claim in the District Court was that Texaco violated Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), by virtue of the fact that it sold gasoline to Flinco, Inc. ("Flinco"), a wholesale distributor which from time to time also operated retail stations, at a lower price than that charged petitioners.

Texaco purchased all of the gasoline it sold in Utah—including that sold to petitioners and to Flinco—from American Oil Company's Utah refinery where American made gasoline to Texaco's specifications (352-56, 553, 1909-12). Texaco sold this gasoline to petitioners at its retailer or "tankwagon" price. With respect to Flinco, Texaco sold gasoline at its distributor discount off the tankwagon price in recognition of the wholesaling func-

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that plaintiffs were not injured or damaged thereby, rendering this claim moot. Accordingly, there was no occasion to appeal the erroneous instructions and rulings which enabled the jury to find a violation against the evidence. Petitioners now contend, incredibly, that Texaco should be found to have participated in a horizontal agreement with major oil companies to fix wholesale prices on the basis, in part, of the jury verdict relating to plaintiffs' retail prices (Pet. 4, Ques. 3(e)). It might be noted therefore, that it was proven that plaintiffs charged any prices they chose (Exs. D-48, 49) so that, for example, plaintiff Belliston disregarded Texaco's suggestions over 99% of the time throughout the relevant period (*Id.*).

[4] Exs. P-23a, D-11, D-53, D-120-21; 680, 730-32.

tions Flinco performed [5] which retailers such as petitioners did not undertake.[6] Flinco's contract with Texaco was on a year-to-year basis (Exs. P-5, P-6; 1223). Hence, unless Flinco received a discount competitive with that granted by other major oil companies in the area, Texaco faced the loss of Flinco to another supplier.[7] Consequently, the amount of Flinco's distributor discount was set in response to changes in the discounts granted distributors by competing major oil companies (Exs. D-122-28; 1873-75, 1877-88). The discount did not exceed the wholesaling expenses and a reasonable return on investment (241, 1192-93, 1496-97, 1739).

Frequently, to meet its competition, Texaco gave retailers in different parts of the Salt Lake area discounts or "allowances" off the tankwagon price.[8] Flinco would not receive such allowances unless it was supplying a station in the particular depressed area, and then only 70% of the amount that would be given a retailer supplied directly.[9] The allowances sometimes exceeded 4¢ per gallon, while the distributor discount on regular gasoline was always less than 4¢ per gallon (Exs. P-15, D-123; 1881, 1886-88).

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[5] Ex. P-15; 221-22, 251-54, 281-85, 399-402, 410-11, 1122-23, 1337-41, 1362-64, 1518-21, 1678, 1681-84, 1687, 1723-24, 1870-74.

[6] 229-30, 286, 760-61, 962-63, 1123, 1338-41, 1345, 1494-96, 1520-22, 1681-83, 1869-72, 1944.

[7] 1215-16, 1504, 1874-75, 1891-93, 1958.

[8] Ex. D-131 (letter of May 21, 1963, p. 3); 112-13, 208-09, 217-19, 223-24, 869, 956, 1239-40, 1335, 1442.

[9] Ex. P-6; 208-10, 223, 255-56, 285-86, 407, 1079-80, 1205-06, 1208.

During the period in question there were approximately 500 gasoline stations in Salt Lake City and another 30 in the neighboring town of Bountiful (Exs. D-52, 54; 1335, 1344). These stations sold Texaco, other major brand and independent or nonbranded gasoline. In general, the Flinco-supplied stations were located several miles from any petitioner's station,[10] with many other stations located substantially closer.[11]

In the Court of Appeals it was Texaco's position that petitioners' proof was insufficient on each element of their Robinson-Patman claim:

> (1) None of the alleged discriminatory sales was in commerce as required by the statute;
>
> (2) There was no evidence of substantial competition between each plaintiff and even one Flinco salary-operated Texaco station, much less evidence that each plaintiff competed with all such Flinco stations scattered as they were over a 30-mile area (the assumption upon which plaintiffs' theory of recovery depended);[12]
>
> (3) There was no evidence that each plaintiff's net price was higher, considering allowances, than the net price to any Flinco salary-operated station with which it may have been in substantial competition;

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[10] In some instances there were 10 or 12 miles separating a plaintiff from the nearest Flinco Texaco station. Exs. D-52, 54: 493, 645, 658, 666, 671, 685, 783, 867, 888, 914, 957, 971, 973-74, 993, 998, 1017.

[11] Exs. D-52, 54; 492-94, 673, 696-97, 740, 780-83, 815-16, 868-69, 914-16, 957, 998-99.

[12] Ex. D-54; 1139. In fact, no plaintiff even specified the name or location of a single Flinco salary-operated station with which he supposedly competed. As the Court of Appeals noted, although Flinco was a wholesaler: "At times it was necessary for Flinco to place its own salaried personnel in charge of stations to keep them open." (App. A, p. iii)

(4) There was no evidence that any such difference in net price produced any injury to competition but, on the contrary, evidence that the distributor discount was exhausted by wholesaling expenses and a reasonable return on investment; and

(5) There was no competent evidence of injury to petitioners' business or property or of any measurable damage.[13]

The Court of Appeals found it necessary to deal only with the first of these reasons for reversal, holding that, under the clear language of the statute and the overwhelming weight of authority, the "in commerce" requirement of the Robinson-Patman Act had not been met. Accordingly, the judgment in petitioners' favor was reversed and judgment for Texaco directed.

B. The Horizontal Price-Fixing Claim

Although petitioners alleged that Texaco conspired with other major oil companies to fix the wholesale price of gasoline, there was no claim and absolutely no proof that Texaco agreed with its competitors on the prices it would charge its dealers. Instead, the claim was predicated upon

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[13] Plaintiffs' response in the Court of Appeals, when confronted with an unanswerable demonstration of the fatal deficiencies in their damage proof at trial, was to suggest to that Court that it not only give them another chance to prove the quantum of damages but that it tell them how to go about it.

> "[I]f the *Bigelow* rule applies, but this Court should hold that the computation was not sufficiently precise, this Court should state what method of computing the difference is sufficient and remand for computation by a master and direction of a verdict upon the master's findings" (Brief for Appellees 49).

The Petition for Certiorari, although requesting reinstatement of the district court judgment, makes no reference to the glaring defects in plaintiffs' proof of damages. Indeed, the subject does not even appear among the 15 Questions Presented.

the following conduct by Texaco: (1) it made its current tankwagon price and general allowances to dealers publicly available, as it had done for decades (1242, 1445, 1893-94, 1904-05); and (2) before granting general price allowances to enable its dealers in an area to remain competitive,[14] it sought to verify its competitors' current public price postings, either by personal observation or by telephoning for the information [15] to comply with the meeting competition provisions of the Robinson-Patman Act.[16]

For decades, Texaco's wholesale prices have been publicly available as soon as they go into effect (1893-95). Texaco has furnished them to anyone, including publications, dealers and other oil companies, whether or not such other companies made their current prices public (1242-44, 1445-46, 1904-05). Because the information was public, it provided a convenient reference point for the price term of Texaco's numerous gasoline supply contracts with dealers, making it unnecessary to send out formal notices to each dealer every time a price change occurred. It also had the further important purpose of satisfying Texaco's customers that they were all being treated alike (1894). And, needless to say, with the many dealers in any locality necessarily possessed of this knowledge, the information could hardly be treated as confidential in any case. It had to become public and there was no point in treating it on other than an open and above-board basis. In light of these economic considerations, other oil companies likewise as a general rule publicly posted their tankwagon prices (114, 168, 1225).

In price war situations at the retail level, Texaco, before granting general price allowances to dealers in any area

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[14] 125-26, 582, 689, 988-89, 1225-26, 1238-41, 1244, 1250-51, 1275, 1277, 1333, 1436-41.

[15] Ex. D-130; 102-04, 113-15, 168-70, 1226, 1241-42, 1440.

[16] Exs. D-130, 131 (letter of May 21, 1963, pp. 1, 3); 1895-1900.

to enable them to remain competitive, sought to verify the current public price postings of one or more competitors in order to comply with the meeting competition provisions of the Robinson-Patman Act. The verifying clerk could do this by personally going over to read the posting or, for convenience, telephone for this public information.[17] Again, other oil companies faced the same problem of Robinson-Patman Act verification and some inevitably pursued a similar compliance route.

Misreading this Court's decision in *United States* v. *Container Corp.*, 393 U.S. 333, the district court directed a verdict on this claim in petitioners' favor. On appeal, the Court of Appeals concluded that *Container* was inapplicable for many reasons, including (1) the public nature of the prices involved; (2) the absence of any stabilizing effect on prices or "chilling" of the competitive atmosphere, as illustrated by the highly volatile nature of gasoline prices in the area where there were "many gasoline wars of long duration involving drastic price cuts"; and (3) the need to verify the amount of competitive price cuts to satisfy the requirements of the meeting competition defense. In addition, the Court made it clear that the evidence was insufficient to permit a finding on any basis that Texaco was guilty of participation in an alleged horizontal price-fixing conspiracy. On the contrary, the record showed Texaco's conduct to be independent, competitive and entirely lawful.

The Court of Appeals concluded:

> "The retail gasoline trade in Salt Lake City underwent many drastic price wars during the period in question. When a war started, it was necessary for the supplier of the retail outlets to grant allowances to their outlets so that they could lower their prices in order to remain competitive. When Texaco heard from one of its Dealers that a competitor had lowered its prices, Texaco endeavored to verify the information. *Texaco neither asked for nor received*

[17] 102-04, 113-15, 167-69, 1225, 1241-44, 1919-22.

> *information about impending price changes.* By seeking verification Texaco was simply complying with the requirements laid down in Federal Trade Commission v. A. E. Staley Manufacturing Co., 324 U.S. 746 (1945). That is, Texaco was attempting to confirm the reports of its retail outlets that their competitors had lowered their prices. This much would be necessary before Texaco could lower its prices and still be within the 'meeting competition' defense." (App. A, p. xvi; emphasis added)

When petitioners moved in the Court of Appeals for rehearing and a new trial on the assertion that the evidence was sufficient to permit a jury finding of agreement with other major oil companies to fix prices, the Court of Appeals, finding no such sufficient evidence, denied the motion.[18]

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[18] Petitioners' Question Presented No. 3 (Pet. 3-4) tenders this sufficiency issue but seriously misrepresents the record. Thus, it lists 7 items which it claims spell conspiracy but which the record does not support. For example, the record does not establish the existence of "price identity." Quite the opposite; prices differed widely in the area during the period. Indeed, in this very case petitioners complain of Texaco's own different price to Flinco and of Flinco's selling to its dealers at 2¢ below the price petitioners paid Texaco (Pet. 46). In fact, the record discloses that it was Texaco's unwillingness to accede to petitioners' unlawful efforts (dating back to 1961) to have it dictate Flinco's prices which prompted the bringing of this suit (Ex. P-36, D-43; 423-29, 434, 437, 441, 444-46, 480-84, 488-90, 584-85). Secondly, the reference to a "systematic exchange of prices among competitors controlling 85% of the market" is equally baseless. Not only is the key factor of the public nature of the prices omitted, but the Court of Appeals explicitly found:

> "Here, 42% of the gasoline stations in the Salt Lake City area were independently operated. Not only does the record fail to disclose a price exchange agreement among all of the major supplying companies, but it also fails to evidence any exchange involving the suppliers of the independently operated service stations." (App. A, p. xv).

The other factors listed by petitioners in Question 3 similarly play fast and loose with the evidence and add up to nothing approaching evidence that would permit a finding of illegal conduct.

Finding the evidence insufficient on the issue of violation, the Tenth Circuit did not have to deal with the issues of impact and damages and did not do so. It should be noted, however, that there was no evidence from which a jury could properly conclude that any petitioner was injured in his business or property by virtue of the alleged agreement to exchange current publicly available price information; nor was there any evidence from which a jury could rationally measure any petitioner's damages. Moreover, there was not even a showing that the claimed conspiracy had any impact whatever—on prices or anything else. The record will be searched in vain for a scintilla of evidence that but for the claimed conspiracy prices would have been lower.

C. The Tie-In Claim

Texaco recommended to its dealers that they buy tires, batteries and accessories ("TBA") from any one of four tire companies with national distribution and public acceptance with whom Texaco had sales commission agreements (Ex. P-30; 381-84, 1483-84). Texaco received a commission for its sponsorship when such a company sold to a Texaco dealer. This claim was predicated on the theory that as a result of such sponsorship, the dealers were forced or compelled to accept unwanted TBA in order to get a product they did want. The proof, however, belied the claim.

Indeed, 12 plaintiffs offered no evidence at all regarding what prompted their selection of TBA, and the remaining 3 did not testify that Texaco in any way affected their TBA choices (453-54, 467-69, 570-72, 974-76, 999-1002). Finding no evidence of coercion, the Court of Appeals directed that this claim be dismissed. Again, the Court did not reach the issue of impact and damages as to which, once more, there was no evidence. Without rhyme or reason, the jury found no damages as to three plaintiffs, $1 damages as to two others and a total of $2,693 for the re-

maining ten. Despite its *de minimis* nature, the Petition seeks certiorari and review to reinstate this baseless verdict.

ARGUMENT

The Decision Below Was Correct And Presents No Important Federal Questions.

Rule 23(4) of the Rules of this Court provides that the "failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." It is respectfully submitted that the Petition is neither accurate, brief nor clear. Indeed, it totally misconceives the role of the Supreme Court in the judicial system. It would have this Court serve as a second court of appeals, implicating itself in a morass of factual issues which involve neither important federal questions nor conflicts among the circuits. When the Petition's irrelevancies, diatribes and extra-record speculations are stripped away, what remains is the indisputable fact that the decision of the Court of Appeals was eminently correct, was fully in accord with all of the applicable precedents, and raises no issue warranting review by this Court.

A. The Robinson-Patman Act Was Correctly Applied

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides, in relevant part, that:

> "It shall be unlawful for any person *engaged in commerce,* in the course *of such commerce,* . . . to discriminate in price . . . *where either or any of the purchases involved in such discrimination are in commerce.* . . ." (emphasis supplied)

It has long been settled that this plain statutory language means precisely what it says. To violate the Robinson-

Patman Act, a seller must not only be "engaged in commerce," and his acts be in the course of such commerce but at least one of the alleged discriminatory sales must be in commerce. This controlling principle was enunciated by this Court in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 118:

> "Respondent is engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the *interstate* transactions and cutting the price in the *intrastate sales.*" (emphasis by the Court)

Since *Moore*, the rule has been uniformly applied by the lower courts. *See, e.g., Walker Oil Co.* v. *Hudson Oil Co.*, 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042; *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir. 1969), *cert. denied*, 396 U.S. 901; *Abramson* v. *Colonial Oil Co.*, 390 F.2d 873 (5th Cir. 1968), *cert. denied*, 393 U.S. 831; *Food Basket, Inc.* v. *Albertson's Inc.*, 383 F.2d 785 (10th Cir. 1967); *Willard Dairy Corp.* v. *Nat. Dairy Prods. Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934; *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265 (7th Cir. 1961), *cert. denied*, 368 U.S. 829; *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969); *Borden Co.* v. *FTC*, 339 F.2d 953 (7th Cir. 1964).

The Court of Appeals merely applied this settled principle in holding that the statute's "in commerce" requirement was not met here because all of Texaco's relevant sales of gasoline were made in Utah. More particularly, Texaco purchased the gasoline from American in Utah and resold it, to petitioners and to Flinco, within that state. Moreover, the gasoline itself never crossed a state line. It was refined by American in Utah from

crude oil, a separate and distinct product, which had been brought into the state by American.

Petitioners challenge this ruling essentially on three grounds: (1) that so construed the statute may be rendered ineffective; (2) that this Court's ruling in *Standard Oil Co.* v. *FTC*, 340 U.S. 231 is somehow inconsistent with the Court of Appeals' decision; and (3) that the Fifth Circuit's recent decision in *Littlejohn* v. *Shell Oil Co.*, 456 F.2d 225 (5th Cir. 1972) stands for a contrary principle. None of these assertions has merit.

Petitioners' arguments with respect to the theoretical effectiveness of the Robinson-Patman Act should be addressed to Congress, not this Court. The determination that price discriminations involving solely intrastate sales are beyond the purview of the statute was made by the legislature when the statute was enacted and, of course, it is for it to determine whether the law should be amended.

Insofar as *Standard Oil* is concerned, that case is plainly inapposite, as the Court of Appeals properly noted (App. A, p. xi). There, the *seller* transported *gasoline, not crude oil*, from Indiana into Michigan from whence it sold the selfsame product at discriminatory prices to its Michigan dealers. As the Court of Appeals held, "Standard shipped the gasoline to itself across a state line. The product was never altered; therefore, the 'flow of commerce' theory applied."(*Id.*) Here, on the other hand, it was American, not Texaco, which transported crude oil, not gasoline, into Utah where Texaco bought it. When discriminatory sales are made in one state of a finished product converted in that state from raw materials emanating from another state, the flow of commerce has come to a halt, and the statute is inapplicable. *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265 (7th Cir. 1961), *cert. denied*, 368 U.S. 829; *Baldwin Hills Bldg. Materials Co.* v. *Fibreboard Paper Prods. Corp.*, 283 F.

Supp. 202, 204 (C.D. Cal. 1968); *Myers* v. *Shell Oil Co.*, 96 F. Supp. 670 (S.D. Cal. 1951). *Standard Oil* is thus completely consistent with the ruling below, as well as with the unbroken course of uniform decision in the courts of appeals since the *Moore* ruling almost two decades ago. Nor is *Littlejohn* of avail to petitioners. That case, unlike this one, did not involve the typical secondary-line claim by a customer that the seller charged lower prices to other customers with whom it competed. Instead, the plaintiff there was not a customer of the seller but an independent gasoline dealer in indirect competition with defendants. His claim, of the primary-line variety, was that he was injured by defendants' low price sales to those dealers who were his local competitors, which low price sales were subsidized by higher priced sales to other customers in a different state. In other words, *Littlejohn* involved a situation analogous to the typical area price discrimination claim in primary-line cases such as *Moore*. In *Littlejohn*, as in *Moore*, there were sales across state lines to meet the statute's commerce requirements. Here, *per contra*, there is no claim of any discriminatory sale outside of Utah.

In short, the commerce aspect of this case, as decided in the Court of Appeals, involves no novel issues, no substantial federal questions, and no diversity of opinion among the circuits. It accordingly does not warrant review by this Court.

The petition also seeks review of other Robinson-Patman issues which, in light of its finding with respect to commerce, the Court of Appeals did not reach. Far from supporting the grant of certiorari, the existence of all these other hurdles to recovery by petitioners underscores the futility of any such grant. Petitioners' claim is so fundamentally deficient and so devoid of evidentiary support as to make it particularly ill-suited for the resolution of any legal issue.

B. The Horizontal Price-Fixing Claim Was Correctly Found To be Unsupported by the Evidence

The ruling of the Court of Appeals that *United States* v. *Container Corp.*, 393 U.S. 333 is distinguishable from the present case is eminently correct. Indeed, *Container's* inapplicability is demonstrable on three separate and distinct grounds, all of which were relied upon by the Court of Appeals.

First, *Container* dealt with an exchange of price information which "was not available from another source" (393 U.S. at 335). It did not deal with verification of publicly posted and available prices. There is all the difference between inquiring about and disclosing public information for purposes of convenience and the exchange of price data which in some industries is a closely guarded secret. Obviously, businessmen must have the right to publish and disseminate price lists, to put price tags and signs on products, to announce publicly what their prices are, and, in order to be competitive, to make efforts to learn what prices are being charged by other sellers. It is noteworthy that the Government never challenged in *Container* the exchange of information which was otherwise publicly available (Brief of United States on Appeal 41). The thrust of its complaint there was that when a customer asked package manufacturers to submit price quotations for a special packaging order, sellers should not have given their confidential quotation to a competitor in advance of the latter's bid, thereby defeating the buyer's hope of bettering either seller's offer—a glaringly different situation from the instant one.[19]

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[19] As the Court of Appeals stated: "The prices were publicly available. They were noted in the trade journals and often announced in the Wall Street Journal. This distinguishes *Container* in that the prices involved there were not available through other sources. Texaco made its prices available to anyone regardless of any reciprocity" (App. A, p. xiv). That the *Container* ruling

Second, this Court did not hold that an agreement to exchange non-public price information is *per se* illegal. The *Container* decision was premised on the express finding that the exchange agreement in question had an anti-competitive effect. In Mr. Justice Douglas' words, "the result of this reciprocal exchange of prices was to stabilize prices. . . ." 393 U.S. at 336. Indeed, the opinion made it clear that some price exchange arrangements might have no anticompetitive effect:

> "Price information exchanged in some markets may have no effect on a truly competitive price." *Id.* at 337.

Here, on the other hand, there is not an iota of proof that the vigor of price competition was chilled by any exchange. In the Court of Appeals' words, "the record is replete with references to many gasoline wars of long duration

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has no bearing on agreements to exchange publicly available prices is further demonstrated by the judgment in United States v. FMC Corp., 1970 Tr. Cas. ¶73,258 (E.D. Pa. 1970), a case in which the defendant was found to have fixed prices by exchanging non-public price information and discussing the need for higher prices. *See* 306 F. Supp. 1106, 1142-43 (E.D. Pa. 1969). Despite this finding, the final judgment specifically permitted the exchange of price "information which has been previously or is simultaneously released to the trade generally or has been disclosed by any person who is not competing with defendant in the sale of such . . . products." *Id.* at p. 89,028. *Accord*: United States v. Beatrice Foods Co., 1972 Tr. Cas. ¶73,853 at p. 91,588 (D. Utah 1972); United States v. Continental Oil Co., 1971 Tr. Cas. ¶73,404 at p. 89,648 (D. N. Mex. 1971). Indeed, any other reading of *Container* would require the absurd conclusion that a department store courts Sherman Act liability if its clerk calls a competing store to obtain information about prices posted in the store window in order to avoid walking over to see for himself.

involving drastic price cuts. This hardly indicates a 'chilling' of the competitive atmosphere." (App. A, p. xiv).[20]

Third, this Court recognized the continued vitality of Justice Stone's opinion in the *Cement* case, which held that price information could be exchanged for lawful purposes, such as to prevent a fraud by purchasers.[21] Here the lawful purpose of the verification of posted prices was to enable Texaco to comply with the Robinson-Patman Act. As the Court of Appeals found, "[b]y seeking verification Texaco was simply complying with the requirements laid down in *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945). That is, Texaco was attempting to confirm the reports of its retail outlets that their competitors had lowered their prices. This much would be necessary before Texaco could lower its prices and still be within the 'meeting competition' defense." (App. A, p. xvi).

In sum, the Court of Appeals' conclusion that *Container* is not applicable here was correct on each of the three stated grounds.

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[20] Witnesses on both sides agreed on the fact of incessant price wars (869, 956, 988, 1335, 1426, 1442, 1902-03, 1907-08). There were between 76 and 102 price changes (depending on the section of Salt Lake City affected) in the prevailing major brand price among retailers during the period in suit and a range of retail price fluctuations of 10¢ per gallon, which was 100% of the lowest retail price (ex state tax) of regular gasoline and 70% of the lowest premium price (ex state tax) (Exs. D-81, P-23, p. 5; 1616-22). Such price changes, as petitioners themselves elicited, corresponded to price changes at the wholesale level (217-19, 1441, 1460-61).

[21] Thus, the *Container* opinion distinguished Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, on the ground that the "controlling circumstances" of that case were not present:

> "[The] cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than was needed for a specific job." 393 U.S. at 335.

In evident recognition of this fact, petitioners assert that this Court should also review the Court of Appeals' denial of their motion for rehearing on an alternative Sherman Act premise. As noted above, however, there is no sound basis in the evidence for the new theory which petitioners espouse (*supra* note 18). The Court of Appeals properly concluded, in denying rehearing, that the evidence of record is insufficient to permit a finding on any basis that Texaco entered into any price-fixing agreement with other oil companies. It was entirely appropriate for that Court to have made this determination in disposing of the rehearing motion. *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 329. Plainly this matter does not rise to the level of a substantial federal question warranting the expenditure by this Court of the time and effort needed to examine a massive record on a question of sufficiency of evidence which the Court of Appeals has already done.

Conclusion

Chief Justice Taft stated for a unanimous Court in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties...." *See also, Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74. It is respectfully submitted that the instant Petition raises no question of importance. The Court of Appeals' dismissal of the Robinson-Patman claim involved the straightforward application of explicit statutory language to the indisputable facts. Its dismissals of the tie-in and horizontal price-fixing claims were clearly correct and were founded upon its assessment of the sufficiency of the evidence in this record. The Tenth Circuit's award of printing costs is also a matter which, it need hardly be

stated, is best left to the judgment of the courts of appeals. Accordingly, the decision below does not warrant review by this Court. Moreover, it is respectfully submitted, the fact that the petition would require the Supreme Court to embark upon a wholesale review of a host of issues with which the Court of Appeals properly found it pointless to burden itself, further renders the grant of certiorari patently inappropriate.

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